IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 43 OF 2000

Indian Plywood Manufacturing
Co. Ltd. and Ors. ....Applicants.
V/s
Mr. P.S. Dave and anr. ....Respondents.

Shri N.K. Thakore with Shri Prakash Naik for the applicants.
Shri H.V. Mehta for respondent No.1.
Shri R.Y. Mirza for the State.

ALONG WITH
CRIMINAL APPLICATION NO. 44 OF 2000

Indian Plywood Manufacturing
Co. Ltd. & Ors. ....Applicants.
V/s
Mr. P.S. Dave & anr. ....Respondents.

Shri N.K. Thakore with Shri Prakash Naik for the applicants.
Shri H.V. Mehta for respondent No.1.
Shri R.Y. Mirza, APP for the State

CORAM: V.M. KANADE, J.
DATE: 14th March 2006

ORAL JUDGMENT:

1. Both these Criminal Applications can be disposed of by a common judgment since the issue involved in both these matters are identical.

2. The applicants in Criminal Application No. 43 of 2000 filed income-tax return for the assessment year 1992-93 on 13th September, 1992. The order was passed under section 193 dated 8/3/19985 by the Inspecting Assistant Commissioner, Assessment Range V(B) whereby total income was assessed at Rs 1,29,74,262/-

including an amount of Rs 27,17,994/- which was the amount of refund of excise duty received in the year 1981. The addition made by the Inspecting Assistant Commissioner was upheld in the appeal. The application made by the applicants for change in the accounting period was allowed.

3. It was alleged that the excise duty was not credited to its profit and loss account and this was done to avoid income-tax. Accordingly, penalty proceedings were initiated under section 271(1)(c) of the Income-tax Act and on 27/3/1987, the order was passed imposing penalty to the tune of Rs 89,08,882. Finally, the Commissioner of Income-tax by order dated 28th March, 1990 set aside the penalty which was imposed.

4. Simultaneously, after the penalty proceedings were initiated, a complaint was filed in the Court of the Additional Metropolitan Magistrate, 19th Court, Esplanade, Mumbai vide Criminal Case No.4/S/87 for the offence punishable under sections 276-C and 227 of the Income-tax Act read with section 273B of the said Act. The process was issued on the said complaint. Though, the Commissioner of Income-tax (Appeals) Bombay had allowed the appeal filed by the applicants, the

criminal proceedings were not discontinued and, therefore, the present Criminal Application was filed for quashing the said criminal proceedings.

5. The learned Counsel appearing on behalf of the applicants submitted that in view of the provisions of section 279(1)(a), if the penalty imposed on the assessee under clause (iii) of subsection (1) of section 271 has been reduced or waived by an order under section 273A, the criminal proceedings were liable to be dismsised and could not be continued. He invited my attention to the provisions of section 279(1A). He submitted that the Supreme Court in the case of K.C. Builders and another vs. Assistant Commissioner of Income-tax reported in **(2004) 2 SCC 731** had held that in the event of penalty imposed under section 271(1)(c) being cancelled or waived by ITAT by holding that there was no concealment then, in that case, quashing of the prosecution under section 276-C is automatic. Sections 279(1) and 279(1A) read as under:-

> "279(1) : A person shall not be proceeded against for an offence u/s 275A, Sec. 276, Sec. 276A, Sec. 276B, Sec. 276BB, Sec. 276C, Sec. 276 CC, Sec. 276D, Sec. 277 or

Sec. 278 except with the previous sanction of the Chief Commissioner or Director General of Commissioner.

Provided that no such sanction shall be required if the prosecution is at the instance of the Commissioner (Appeals) or the appellate authority.

EXPLANATION : For the purpose of this Section "appropriate authority" shall have the same meaning as in Clause (c) of section 269UA".

279 (1A) : A person shall not be proceeded against for an offence u/s 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) or sub-section (1) of section 271 has been reduced or waived by an order u/s 273A".

It is an admitted position that the Commissioner of Income-tax (Appeals) had set aside the penalty which was imposed and allowed the appeal by holding that no penal cause under section 271(1)(c) was made out

against the applicants and that no penalty was attracted under the said provisions. Thus, in view of this order which is passed by the Commissioner of Income-tax (Appeals), the complaint which is still pending in the Court of Metromolitan Magistrate will have to be quahsed in view of the clear and unambiguous provisions of section 279(1)(a).

6. The Supreme Court in the case of K.C. Builders and another (supra) in para 24 of the judgment has observed as under:-

> "24. In the instant case, the penalties levied under section 27(1)(c) were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal in ITAs Nos. 3129-32. It is settled law that levy of penalties and prosecution under section 276-C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276-C is automatic."

The ratio of the said judgment, therefore, is squarely applicable to the facts of the present case.

7. In the result, Criminal Application No.43 of 2000 is made absolute in terms of prayer clause (b). Rule is made absolute in the above terms.

8. In Criminal Application No. 44 of 2000, the applicants were prosecuted under section 193 read with section 191 and 192 read with section 34 of the Indian Penal Code. The allegations made against the applicants in the said case were identical that they had not disclosed the refund of excise to the tune of Rs 27,17,994/-. The penalty was, therefore, imposed by the Inspecting Assistant Commissioner, Assessment Range V(B), Bombay which, in turn, was set aside by the Commissioner of Income-tax (Appeals), Bombay. The ratio of the judgment, therefore, in the case of K.C. Builders and another (supra) is also squarely applicable to the facts of the present case.

9. In the result Criminal Application No.44 of 2000 is also allowed in terms of prayer clause (b). Rule is made absolute in the above terms.

10. Both the above criminal applications are accordingly disposed of.

V.M. KANADE, J.